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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

* * *

NO. 80-5658

* * *

RENE MIRELES RUIZ, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

* * *

ON APPEAL FROM COUNTY COURT AT LAW NUMBER 1

HIDALGO COUNTY, TEXAS

* * *

APPELLANT'S BRIEF OPPOSING APPELLEE'S MOTION TO DISMISS OR AFFIRM

* * *

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INTRODUCTION

The Appellant, Rene Mireles Ruiz, respectfully files this Brief Opposing Appellee's Motion to Dismiss or Affirm.

Because Appellant believes that the Statement of the Case in Appellee's Motion incorrectly cited some facts or took them out of context, Appellant submits this brief to show that, under the facts cited by Appellee and the other facts in this case, the Texas statute prohibiting abusive language was unconstitutionally applied against Appellant.

Generally, Appellee's Motion strengthens Appellant's claim of the absence in this case of an essential element of the crime of abusive language under the Texas Penal Code §42.01(a)(1), namely, that the words allegedly used by Appellant were "fighting words" which tended to incite an immediate breach of the peace by the person to whom the words were addressed.

STATEMENT OF THE CASE

Appellant respectfully submits that this statement of the facts shows the circumstances and context in which the criminal charge arose for which Appellant was convicted.

Appellant Rene Mireles Ruiz was riding in a pick-up truck one evening with a friend, Randall Sarabia, who was driving. Two Texas Department of Public Safety (DPS) officers stopped Sarabia for running a red light and cutting a corner through a parking lot.

Apparently, the driver did not know the DPS officers were following him until he stopped at a fried chicken restaurant. (Statement of Facts: p. 21, lines 17 - 25; p. 48, lines 3 - 22).

While DPS Officer Carlos Benavides was questioning the driver Sarabia, Appellant did not impede the questioning (Statement of Facts: p. 23, line 21 - p. 24, line 13).

Benavides then ordered the driver to proceed to the McAllen police department about two miles away, where he gave him a traffic citation. Appellant expressed his displeasure to Benavides that he had brought them over to the department rather than ticketing his friend with a citation on the street.

In the McAllen police station, Appellant again expressed his displeasure at the situation, but not in language criticized by the officers. A McAllen police officer asked Appellant to quiet down, and he did so. (Statement of Facts: p. 120, line 6 - p. 121, line 2).

While the driver was receiving the citation, Appellant returned to sit on the passenger side of the pick-up. It was quite late at night, and the parking lot was virtually empty. Shortly thereafter, the two DPS officers went to leave and got in their car which was parked near the passenger side of the pick-up.

At this point, the testimony of Appellant and the officers diverges. Appellant claims that he simply glared at the officers. The officers claim that he, while seated in the truck, listening to music, shouted "motherfucker" loudly three times at Benavides.

It is undisputed, however, that neither officer felt provoked or urged to violence in any way (Statement of Facts: p. 37, line 11; p. 59, lines 5 - 9; p. 77, line 24 - p. 78, line 7; p. 79, lines 8 - 14; p. 80, lines 11 - 15; p. 98, line 15 - p. 99, line 1; p. 99, lines 11 - 14). In fact, Benavides said he was not even offended (Statement of Facts: p. 77, line 24 - p. 78, line 7).

It is also undisputed that the words, if any, were directed to Benavides and not to the public at large. The parking lot was

nearly vacant, and Appellant did not go out to the street and hollar. (Statement of Facts: p. 77, lines 6 -23; p. 83, line 1 - p. 85, line 4; p. 108, line 4 - p. 110, line 19).

Further, one of the DPS officers said that, at that time when the Appellant was in the truck, he was the least physically aggressive that he had been that evening (Statement of Facts: p. 117, line 16 - p. 118, line 1).

The interesting question raised by Appellee's motion is the officers' use of force. Both officers claim they did not use excessive force against Appellant. However, Appellee's motion cites the testimony of Arnoldo Ramirez, a bystander who happened to be in the police station at the time, who said that the officers used very excessive force on Appellant, who himself was not using force. (Statement of Facts: p. 42, lines 7 - 8; p. 275, line 24 - p. 276, line 13; p. 138, line 6 - p. 139, line 15).

Appellant was then charged with and convicted of public intoxication and abusive language in municipal court. On appeal to the County Court, he was acquitted of public intoxication but again convicted of the crime of abusive language.

From the County Court conviction, Appellant has made this appeal.

APPLICATION OF THE TEXAS ABUSIVE LANGUAGE STATUTE TO SPEECH WHICH DOES NOT HAVE A TENDENCY TO INCITE A LISTENER TO VIOLENCE ABRIDGES FREEDOM OF SPEECH

Appellant was arrested for allegedly having called Officer Benavides a "motherfucker" three consecutive times. The record is clear that, for the hour or so that Appellant was with the officers, it was only at the end of the encounter, after he was sitting on the passenger side of the pick-up truck, when he allegedly used the words which the officers claim. (Statement of Facts: p. 117, line 16 - p. 118, line 1).

Up until that time, the officers did not claim that he used any other abusive language whatever; and they did not claim that he physically interfered with them. They simply did not like that he persistently objected to their making his friend drive to the police station only for a traffic ticket. Appellant insisted

that they should have given the ticket to his friend out on the street.

Only at the end of the incident is he alleged to have used the language, at the time when one of the officers affirmed that he was least aggressive.

What happened in this case, as one of the officers said in the trial, is that Appellant was really arrested for his "attitude" rather than for language which tended to provoke an immediate breach of the peace. "It was a combination of things. It was not one incident at that point. It was a general deterioration in his attitude" (Statement of the Facts: p. 102, lines 21 - 23; p. 101, line 20; p. 104, line 10). As Benavides said, "...from the very beginning I think he had an attitude towards me" (Statement of Facts: p. 76, lines 17 - 18).

The same point is conceded in the Appellee's Motion: "This behavior [which admittedly was not illegal] is indicative of Appellant's attitude toward the policemen following just behind the pickup" (Appellee's Motion, p. 3). "The fact that Appellant had taken on an adversarial role which continued over a substantial period of time distinguishes this case from those he cites". (Appellee's Brief, p. 4). The fact that the Appellant assumed an adversarial role and questioned the officers' actions does not mean that he was guilty of a crime.

Even Appellee's Motion (p. 4) clearly admits that Benavides was neither offended nor provoked to violence by what Appellant allegedly said. The State attempts to say that Appellant's language tended to provoke a breach of the peace because of a "potential audience", "potential witnesses", or "potential to cause harm" (Appellee's Brief, p. 5). It is exactly such a vague application of the Texas statute which the cases prohibit. Such is not the test in determining whether the language used tended to provoke an immediate breach of the peace by the person to whom it was addressed. There simply was no audience or witnesses, only the Appellant and two officers.

Appellee's speculation about the highly Mexican-American and Catholic area of Hidalgo County is conjecture at its best and wholly unsupported by the record. It also shows a lack of familiarity with the Spanish language and its more common, daily expressions.

Certainly, the language that Appellant is alleged to have used in this case is not language that is criminal under the vast authority of this Court.

CONCLUSION

Therefore, Appellant respectfully urges that probable jurisdiction be noted and the case summarily reversed. Alternatively, the Court should set this case for plenary consideration and deny Appellee's Motion in its totality.

Dated: January 23, 1981.

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that on this 23rd day of January, 1981, three copies of the Appellant's Brief Opposing Appellee's Motion to Dismiss or Affirm were mailed, postage prepaid, to Douglas M. Becker, Assistant Texas Attorney General, attorney for Appellee, at Box 12548, Austin, Texas 78711. All parties required to be served have been served. I am a member of the Bar of this Court.

James C Harrington
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